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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 382

WALTER E. BANTOM, JR., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, Walter E. Bantom, Jr., et al., by their counsel of record, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on May 15, 1964. (R. 123)

OPINIONS BELOW

The Opinion of the United States Court of Claims is set forth in the record on pages 95 to 115. It is also set forth on pages 1 et seq. of the Appendix to the Petition.

JURISDICTION

The final judgment of the United States Court of Claims was entered on May 15, 1964, page 25 of the Ap-

pendix. This petition is filed within 90 days from the date of the judgment. Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1)

QUESTIONS INVOLVED

Whether the petitioners, who are employed as Security Policemen in the Frankford Arsenal at Philadelphia, Pennsylvania for a period of time more than 40 hours per week, are entitled to receive payment for one-half hour each working day when they are on duty for a period of 8½ hours when in fact they only receive pay for 8 hours.

STATEMENT OF THE FACTS

The petitioners in this action filed a petition on December 29, 1961 claiming overtime compensation from the period of December 29, 1955 for one-half hour each working period. During the period of time the petitioners were employed from December 29, 1955 to the date of the filing of the petition, the petitioners were rotated in their capacities as Security Policemen in what was known as three shifts. The "A" shift was from 7:30 in the morning to 16 hours in the afternoon; the "B" shift was from 15:30 to 24 hours; and the "C" shift was from 23:30 to 0800 hours. The Court will immediately note that each of these shifts was for a period of 8½ hours. The time indicated herein is the manner in which the Navy computes time.

During the 8½-hour period of each tour of duty the petitioners were in full uniform with side arms attached and in a duty status during the entire period of time. Ninety percent of the petitioners brought their own lunch during the "A" and "B" scheduled tours of duty. The "C" shift was from 11:30 at night until 8 o'clock the next morning and there were no facilities for eating on the

premises during this time. Many of the petitioners who reported for the "C" shift had already had their meal at home before reporting for duty and worked the 8½-hour period with no time out for eating. This was the situation at the time the suit was filed on December 20, 1961. After the filing of this suit the officials of the Frankford Arsenal issued an order effective in May, 1962 and for the first time the petitioners were given a one-half hour free time for a lunch period. It was the first time that they were permitted to remove their uniforms, take off their side arms and not be subject to call for duty during this period of time. The Respondent's witnesses testified that prior to the order effective May, 1962 all of the petitioners were in a duty status during the time covered by each of the shifts "A", "B" and "C". This fact is undisputed.

The petitioners only asked for a recovery of overtime until the order became effective in May, 1962. They limited their right to recovery to the hours worked prior to that time. The Respondent asserted that they were given the one-half hour for lunch period while in a duty status.

REASON FOR GRANTING THE WRIT

The petitioners assert that the application for a Writ of Certiorari is made in accordance with subdivision (b) of paragraph (1) of Rule 19 of this Court in that the United States Court of Claims has decided an important question of Federal law in conflict with the applicable decisions of this Court and the decisions of the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Eighth Circuit and the United States Court of Appeals for the Ninth Circuit in cases similar, all of which will be hereinafter cited to this Court.

The petitioners also assert that the decision in their case is contrary to the ruling of the United States Court

of Claims in the case of Albright v. U. S., 263-61 and Baker et. al. v. U.S., 328-61. The Albright and the Baker cases have not yet been officially reported.

The question involved in this case is whether the petitioners are entitled to recover for a one-half hour of each working shift in which they were in a duty status. The attorneys for the Respondent assert that this was a lunch period. The petitioners assert that they were in a duty status during all of the 8½ hours of each shift and that they ate their lunch, which 90% carried with them, while in this duty status. It is undisputed and even testified to by the witnesses for the Respondent that they were in a duty status during all of the 8½ hours. The first time that they got a one-half hour free time for lunch period was after the order of May, 1962 was issued by the officials of the Frankford Arsenal.

The question, therefore, and a very simple one, is whether petitioners in a duty status can be charged for a lunch period. The great weight of authority is to the contrary, as will be shown by the citations hereinafter referred to. In the case of *Armour and Company* v. *Wantock*, 323 U. S. 126, this Court said that the work week ordinarily included all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed place. See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680.

The Courts have applied the basic principles to lunch hours, and have quite uniformily held that an employee must be completely relieved from duty for the purpose of eating regular meals if such periods are to be eliminated from the computation of the number of hours worked by the employee. It has been held by the Courts that an employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, it has been held that an office employee who is

required to eat at his desk or a factory worker who is required to be at his machine while eating is entitled to be compensated. *Culkin* v. *Glenn L. Martin*, Nebraska Co. 97 F. Supp. 661, aff'd. 197 F. 2d 981. (C.C.A. 8), cert. denied 344 U.S. 866, rehearing denied 344 U.S. 888. The case of *Culkin* v. *Martin* is squarely in conflict with the opinion of the U. S. Court of Claims in this case. In the case of *Martin* v. *Culkin*, the Eighth Circuit Court of Appeals pointed out that the lunch period constituted working time. It was emphasized that the guards were required to remain in uniform, including caps, continued to wear sidearms and that they could not remove any part of their uniform during the lunch period. Furthermore, if anything happened they were to act even though it were a lunch period. They were requested to continue to observe signal lights in the cafeteria. The Court held that they could not deduct a thirty minute lunch period from the working time and that this period was compensatory.

It would be difficult to find a case which was closer to the facts as applied to the facts in the petitioners' case than in the case of *Martin* v. *Culkin*. This Court will note particularly that the application for a Writ of Certiorari in the case of *Martin* v. *Culkin* was denied. There are many cases following the rule laid down in *Martin* v. *Culkin*. See *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (Ninth Circuit); *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F. 2d 493 (Sixth Circuit).

The opinion of the United States Court of Claims in this case conflicts with the opinion in the cases of *Albright* v. *U. S.* 263-61 and *R. B. Baker et al.*, v. *U. S.*, 323-61. Neither of these cases are officially reported. In the Albright and Baker cases the petitioners were security policemen employed in the Norfolk Shipyard, Norfolk, Virginia. They sued for overtime pay. They were required to report

fifteen minutes before the daily shift began and they sued for this fifteen minutes. They were then on duty for a period of eight hours. The Court held that they were entitled to recover for this fifteen minutes of time. Then the government attorneys raised the point that a one-half hour lunch period should be a proper set-off against their recovery for the fifteen minutes of time. The security policemen in these cases were doing exactly the same type of duty as the petitioners in this case. The policemen in the Albright and Baker cases brought their lunches with them and ate them while they were in a duty status and the Court held that the government did not have a set-off during this lunch period. There is no difference at all in the fact as to the manner in which the petitioners in this case ate their lunch and the security policemen ate their lunch in the Albright and Baker cases. The United States Court of Claims had the right to overrule their opinion in the Albright and Baker cases but they did not do so. They simply ignored what their conclusion has been in the Albright and Baker cases as applied in the undisputed cases. In other words, they established a rule for security policemen employed by the Navy Department and another rule for security policemen employed by the Department of the Army. The two opinions simply cannot be reconciled. If the Albright and Baker petitioners are entitled to recover, the petitioners in this case certainly are entitled to recover. There is no difference between the facts.

There are set forth in the addendum portions of undisputed testimony which, by stipulation of the parties, is reflective of the testimony which would have been given if all of the Petitioners had been called. In addition there are included excerpts from testimony of Government witnesses who were supervisors and which corroborate the facts established by the Petitioners.

Faced with a record showing, without dispute, that there were substantial periods of working time for which

compensation was due by statute and regulation, the Court of Claims sought to excuse respondent's liability by injecting a new theory of law which, not only was without rational support, but is contrary to long standing and well settled principles of law in the field of management responsibility. The "new approach" is that an employer is relieved of responsibility for the payment of statutory wages where the employee does not complain of being short-changed. This, the Court said, immunized the employer from responsibility because he did not know of the violation.[1]

Aside from the fact that the work was being performed within the confines of an army arsenal in the physical presence of the superior officers and under strict supervision, it has never been held that ignorance on the part of management excused a failure to comply with statutory standards which required an employer to properly count hours and pay wages. The principle is well stated in Lenroot v. Interstate Bakeries Corp. 146 F. 2d 325, 328:

> As pointed out by Judge Cordozo in People v. Sheffield Farms-Slawson Decker Co. 225 N.Y. 25, 121 N.E. 474, 476, the mandate of the statute is directed to the employer and 'he may not escape it by delegating it to others.' The 'duty rests on the employer to inquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates.'

The Court's further attempts to justify its conclusion by relying on the rationalization that there existed a Standard Operating Procedure which, if carried out, would have provided relief for lunch during which employ-

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[1] As a matter of fact the witnesses testified and the Chief of Security Police Branch admitted that management knew but did not act. (Tr. 423-428)

ees might have taken a lunch period in excess of 20 minutes.[2] The statute fortunately does not provide an exception for good intentions. There is, of course, no need or justification for devising a spurious rule of law to excuse respondents in the face of the solid, uncontroverted testimony establishing that the employees worked right through the "C" shift and the Saturday and Sunday shifts without any interruption, that on other shifts there were no regular hours or places for lunch, that relief was sporadic, that employees were in duty status with guns and uniforms being worn, that lunch, when taken, did not exceed 20 minutes. The Court had only to follow its own decision in the *Albright* and *Baker* cases and the long line of lunch-hour cases typified by *Culkin* v. *Martin* (supra) to arrive at an appropriate answer.

Finally, statutes which seek to discourage long hours of employment and to reward employees for arduous overtime are to be construed broadly to achieve those purposes and not narrowly so as to deprive employees of the statutory protection. U. S. v. Silk 331 U.S. 704, 712, 91 L. Ed. 1757, 1767, Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 91 L. Ed. 1772, 1777.

It is obvious from the survey of the evidence before the Court of Claims that the decision does not turn on absence of proof. Instead, the Court breaks new ground in the field of judicial determination of the meaning of "hours worked." This is seen in the key paragraph on page 7 of the decision which states:

> Apart from absence of proof as to when these instances occurred, it is significant that plaintiffs made no complaint to the responsible officials; indeed, such officials had no knowledge of the situation. In these circumstances, work performed by policemen during these periods cannot be said to have been "officially

[2] S.O.P. 513 (Revised June 1956).

ordered or approved" so as to be compensable under the Pay Act.

Thus the whole conception of the meaning of what is working time as defined by this Court is challenged by this determination of the Court of Claims (*Tennessee Coal Iron and RR Co.* v. *Muscade*, 321 U.S. 590, 88 L. Ed. 949, 645 Ct. 698, *Armour and Co.* v. *Wantock* 323 M S 126, *Skidmore* v. *Swift*, 323 U.S. 134, 137, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680).[3]

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[3] It is on the principles established by these cases that the Court of Appeals have settled the law in the "lunch hour" cases supra and which have guided the Secretary of Labor in formulating long existing interpretations of "hours worked" as applied to Rest & Meal Periods as shown by *Part 785—Interpretative Bulletin on Hours Worked* issued by the U.S. Department of Labor which provides:

Section 785.17—ON-CALL TIME

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

REST AND MEAL PERIODS

Section 785.19—MEAL

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co. 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952) cert. denied 344 U.S. 866 (1952) rehearing denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc. 93 F. Supp. 213 (E.D. Mich. 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp. 183 F. 2d 515 (C.A. 9, 1950), 187 F.2d 447 (C.A. 9, 1951), and other cases cited.

CONCLUSION

For the reasons herein stated, the petitioners pray that a Writ of Certiorari be granted in the United States Court of Claims and that upon a hearing that the opinion and judgment of the said Court of Claims be in all things reversed and that this cause be remanded to that Court with instructions to proceed in accordance with the opinions of this Court.

Respectfully submitted,

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ADDENDUM

In support of the general statement of facts, hereinbefore shown, the following extracts from the transcript of the hearing are shown to this Court.

Petitioner HAWKINS—Direct

[Tr. 38] Q How many, do you think, brought their lunch with them? A I would say 85 or 90 per cent.

Q Ninety per cent brought their lunch with them? A Yes.

[Tr. 39] Q All right. Now, on the "C" shifts, what facilities (eating purposes) were there? A None.

Q In other words there was no place where food could be obtained on the "C" shift? A That's right.

[Tr. 40] Q I ask you this, Mr. Hawkins, did you ever observe these security officers that were driving motor vehicles where they were eating their lunches? A Yes, I have.

[Tr. 47] Q Mr. Hawkins, was there any change as the time for lunch periods in March, 1962? A In March 1962 there was no change. In May, 1962, I think May 25th, we got an order from the Provost Marshall, which was posted, which indicated that the supervisor there would be responsible to see to it that each man was entitled and had a half hour's lunch.

Q I see. Was that the first time you ever got an official order that you had a half hour for lunch? A That's right. That is the first time we knew—

[Tr. 49] Q Mr. Hawkins, can you tell us anything more in reference to the eating facilities for lunch periods at the Frankford Arsenal during the time from December '55 to the time you quit there? A Yes. I can say this: That this was an organizational setup. In other words, we never took the attitude that while we were eating, that we had free time, because we felt as policemen there was no such a thing when you were on

duty. We were still carrying our side arms. We were still subject to call—subject to conditions. If a fire alarm broke out, we had to go to duty. It was not a question of whether or not you were aloof or away from your duty; you were always assigned. If you were going to lunch and a disturbance happened—a car accident happened—you had to take hold and take charge of that particular incident.

[Tr. 51] . . . Now, if you ate, you had to eat according to the conditions that exist, and this everybody is aware of. It was a sense of duty. It wasn't a question of whether you ate 10 minutes, 5 minutes, 15 minutes or 20 minutes. It was a question of trying to get dinner whenever you could. We felt and we still contend that from the time we come in the arsenal until the time we hit out, we are on duty, and we always have. And I still think the men still feel that way.

HAWKINS—Cross Examination

[Tr. 84] Q Did you ever miss a lunch? A Yes—many a day.

Q Many times? A Many a time.

Q Wasn't it true if you desired relief and requested it you could have it? A No, it wasn't.

HAWKINS—Cross—by Commissioner

[Tr. 88 and 89] THE COMMISSIONER: Now, would you regard this as free time?

THE WITNESS: No.

THE COMMISSIONER: The time you are spending in the cafeteria?

THE WITNESS: No. First of all let me tell you about this newspaper. We have had plenty of incidents—we have had numerous incidents about newspaper. If I read that newspaper I would be doing it on the QT because I would be on the assumption that if the captain came in and seen me reading that newspaper he would

assume I was goofing, you might say. This is—you are a policeman. This is not a civilian set up down there. And it just isn't done. You don't go in and sit down and relax and read no newspaper. If the provost marshall was to walk in I would have to answer to him as to why I was reading that newspaper. This is a condition that—it just didn't occur. It just didn't occur.

Petitioner HART—Direct

[Tr. 115] A . . . And on the "C" shift there were no facilities at all and on the weekend there were no facilities on for any shift.

[Tr. 116] Q Was the security police maintained on the weekends, on Sundays and Saturdays? A Yes, you still worked your rotating shifts on the three days with a cutback of personnel. If there were no employees and the workload was less, you had a slight cutback in the size of your personnel. In the later years, I would say after the Korean crisis, things like that, the personnel picked up.

[Tr. 117] . . . Q Now did you, during the time you were on the "C" shift, bring your own lunch with you? A No, I have never brought a lunch. I just—if I would eat prior to that, I never had brought a lunch on the "C" shift.

HART—cross

[Tr. 176] Q Then basically what you are saying is that your meal was perhaps subject to interruption, in other words, what— A Not subject to interruption? It was interrupted. Positively it was interrupted.

[Tr. 177] Q But as a general rule, you got it, didn't you? A No, I wouldn't say as a general rule I got it. On the "C" shift it was questionable—

[Tr. 177] Q That's because you didn't carry your lunch? A No, I wouldn't say that. I could have carried a lunch, I could have brought a lunch. But the factor of eating the lunch and putting it somewhere where it would

be presentable to eat, where I could have ate it and such, no.

Q Weren't there reliefs on the "C" shift? A In the last six years? I would go on record to say you would have to show me with documentation where.

Q I am asking you. A No. I would say no. No, no.

Q Did you ever ask for relief on the "C" shift to go to eat lunch? A You know it was asinine to ask the question because you couldn't get it.

[Tr. 178] Q Did you eat lunch on the "C" shift? A No, I wouldn't say that I had to ask for lunch because it was already a stipulated time documented into your work that you didn't get and we argued about it at various times.

Petitioner WEST—Direct

[Tr. 248] A Well, there was no opportunities at all to get anything to eat over there on the "C" shift. And therefore I never carried a lunch on "C" shift, never carried a lunch on "C" because I eat before I came in and I always went home and ate a good breakfast.

Q So that you spent on "C" shift, you spent the 8½ hours on patrol duty; is that correct? A Right, on patrol duty. Yes, sir.

KINCAID—Cross

[Tr. 276] Q In regard to matters such as overtime, lunch periods, and things like that, did you have any complaints on that score? A Well, a lot of times I didn't get my lunch period and I went to the captain, asked—he said, "Well, bear along. It doesn't happen all the time." He said, "We are shorthanded today. This here fellow didn't come in," or "We got another special detail," or something, "and we didn't expect it," and all this kind of stuff. They always had a good alibi for you.

[Tr. 277] Q Was it irregular, or was it seldom or occasionally, that you didn't receive your lunch? A No, it was quite often we didn't receive our lunch.

WEST—Cross

[Tr. 283] THE COMMISSIONER: If they did not have a relief man, then you would have to eat your sandwishes and cake?

THE WITNESS: Right at the box.

[Tr. 284] THE COMMISSIONER: How often when you got the post, either Post 29 or 32, did it come to pass that you couldn't get relief?

THE WITNESS: Well, I will say half the time down there.

WEST—Redirect

[Tr. 299] Q All right, I will ask you this—and in view of the fact the regulation is in here, as counsel well knows, that it gives you 20 minutes with pay, I will ask you this: Mr. West, at any time in your lunch period, how much time did you take on any of your lunch periods that you had? A Mostly I only took about fifteen minutes.

Petitioner DUBIN—Direct

[Tr. 312] Q Yes. Let me ask you this, then, let's take your "A" shift first, what opportunity did you have to eat your lunch on "A" period? A No opportunity at all, sir.

Q Will you explain that, why you had no opportunity? A Well, for the simple reason there is always special duties that came up. There was either special visitors that were coming in, or else there was checking the cafeteria around the cafteria for badges, people that thoughtlessly rush out.

[Tr. 313] Q Let me ask you this, how did you eat your lunch when you were on that "A" shift then? A I didn't sir.

Q Did you carry your lunch with you? A No, sir, I ate two good meals at home.

[Tr. 313] Q In other words, you didn't eat any? A Well, sometimes if I was on a stationary post, I could send out for someone to get a cup of coffee or something like that. Afterwards we set up our own coffee—

Q You never took any time off to go to the cafeteria or snack bar? A No, sir. You couldn't go to the cafeteria. You only had a certain time element and we didn't have no special time for lunch. If you was later than 1:30, the cafeteria was closed.

[Tr. 314] Q I see. That's 1:30 in the afternoon? A Yes, sir. And another thing, sir, as far as the snack bar was concerned, they have what was called janitor service, and they had these janitors coming in here with big baskets in which they carry coffee and they order lunches for the shops. You couldn't even get in there if you tried to get in there.

Q What opportunity did you have for eating on the "B" shift then? A Well, it all depended where you was. If you was on an extreme area, you could make it and sometimes the only way you could get a lunch would be to actually call the snack bar and order something and then maybe sometime later in the day somebody would be patrolling, they would bring it out to you. But there was no time at all for lunch.

[Tr. 315] Q When you were on the "B" shift—and is this true during all the years that you were on that shift? A Yes, sir.

Q I see. Now, how about on your "C" shift? What was the opportunity? What opportunity did you have for lunch period on that? A No opportunity at all, sir. No cafeterias or snack bars or anything.

Q Did you eat on the "C" shift? A No, sir.

DUBIN—Direct

[Tr. 316] Q . . . Mr. Dubin, did you work continuously when you were on the "A" shift from the time prior to the time of roll call to the time that you quit? I mean when you checked out. A Yes, sir. Yes, sir.
[Tr. 317] Q Did you work the same period of time on the "B" shift? A Yes, sir, I worked on all the shifts the same way.

Q Did you work on the "C" shift the same way? A Yes, sir.

Petitioner SHIELDS—Direct

[Tr. 335-E] Q I want to know then on your "A" shift how much time, if any, did you consume in eating your lunch? A Well, like I say, Mr. Dawson, that again is—it would be opinionated on my part because I would say I never actually got a prescribed scheduled lunch period. I ate when I got a shot at it, that's about it.

Q Where would you get your food? A Well, if I didn't bring a sandwich, I had to sneak in the cafeteria—walk in the cafeteria, get one of those 30 cent plates, and wrap it up and go right out.
[Tr. 335-F] Q When you did have a lunch, did you remove any part of your uniform? A You couldn't remove any part of your uniform up until 25 March 1962.

Q Could you remove any part of your side arms? A You couldn't sir.

Q From the time you went on duty on the "A" shift, were you in complete uniform until such a time as you checked out? Checked out of the "A" shift. A Yes sir.
[Tr. 335-G] Q Then was there any time during the time you were on the "B" shift that you could sit down and eat a meal like you would at home, at a table, or anything like that? A I will tell you, Mr. Dawson, the answer is no.

SHIELDS—Direct

[Tr. 335-H] Q . . . What opportunity, if any, did you have for opportunity, if any, did you have for opportunity on the "C" shift for a lunch period? A On the "C" shift, there isn't anything actually. There is no facility. You have to bring your own lunch on the "C" shift, starting at 11:30.

Q When you were on the "C" shift, did you bring your own lunch? A Yes, sir, I brought my own lunch.

Q Where did you eat then? A Same place we do now, one of the desks where you are working.

SHIELDS—Cross Examination

[Tr. 340, 341] BY MR. KINCAID:

A With the risk of being boring and repetitious, we claim that we worked 8½ hours for which we were paid for 8 hours. We worked continually for 8½ hours for which we were paid for only 8 hours. That was our claim to GAO. We were at no time completely divorced from our job for 8½ hours.

SHIELDS—Redirect

BY MR. DAWSON

[Tr. 355] Q I would like to ask you this, despite the fact the regulation provided for a half-hour lunch period did you or any other man ever get a half-hour period for lunch? A Like I say again, like I said to Mr. Kincaid, in our petition, we filed that we worked 8½ hours for which we received compensation for 8 hours, and we were on the job continually for 8½ hours and we ate when we could like any policeman.

[Tr. 356] SHIELDS—Redirect
Recross

Recross Q —any definite time of 30 minutes for lunch where you could sit down and eat your meal? A No, sir. You ate on the fly, whenever you could get a chance.

REYNOLDS—Direct

[Tr. 386] Q . . . "Lunch periods during which the employee is entirely free from duty in connection with his job may not be considered duty time and must be scheduled outside the hours established for the daily tour of duty. When three 8-hour shifts are in operation, however, and overlapping of the shifts to permit time off for lunch is not possible, a lunch period of 20 minutes or less may be counted as time worked for which compensation is allowed. Where the on-job lunch period is in effect, employees must spend their time in close proximity to their work stations. Where the lunch period is free time or if longer than 20 minutes, the entire period may not be included in the daily schedule, the working hours, so that the employees are paid for the lunch period." A Yes, sir, I am familiar with it.

Q And during the time that you ate at the cafeteria or other times, how much time do you consume? A I don't think I would consume more than 20 minutes in the cafeteria, not even that much the majority of the time.

Q That's on the "A" schedule? A On the "A" schedule.

[Tr. 387] Q What about the "B" schedule? A "B" schedule, I never—they had a place where you could get a sandwich or cup of coffee or like that.

Q How did you eat during that period if you did eat? A I brought my own lunch.

Q Where would that be eaten? A In headquarters.

Q At your desk? A At my desk.

[Tr. 388] Q Now, what opportunity did you have, if any, for a lunch period during the "C" shift? A Well, on the "C" shift, I don't think we had any opportunity for lunch period other than bringing your own lunch.

Q Were there any restaurants? A No place in the immediate vicinity was open on the "C" shift nor on holidays, Saturday and Sunday.

[Tr. 400] Q Now, you testified that the men ate in the cafeteria on or around the "A" shift. Was there a time when you gave somebody 30 minutes to eat his lunch during the period of time covered in the petition? Not since the extended lunch period. A Well, I never designated any time or limit on the lunch period. Usually we encouraged the men to eat their lunch as soon as possible and get back so they could relieve the other men on the base.

[Tr. 401] THE WITNESS: Yes, sir. We tried to get the men to eat and be back on the post as soon as possible. As I pointed out before, we do have a train problem coming through there during the day, and any other emergencies that might arise; we like to have the men available where we can utilize them.

Q All right, let me ask you this, Mr. Reynolds: On the "B" shift and on the "C" shift, when no places were available, did you ever ask for a 30-minute leave on those shifts? A Well, I never had nobody—as I recall—ask for a 30-minute relief.

[Tr. 402] Q Nobody ever asked for a 30-minute relief? A Not as I know of.

Q All they would ask you for is for a few—

MR. KINCAID: Objection.

Q I am asking this: What would they ask for? A Usually if they didn't get lunch, they would call up and say "I didn't get no lunch relief." That is the extent—

Q You would send a man down there, would you? A I would send a man down if he were available.

Q Any time, did that consume more than 20 minutes at any time? A Well, I don't know. I couldn't say that it did or did not. Usually we directed a man to go down and relieve him for lunch. And sometimes they would have two or three other ones to relieve for lunch. And usually

we let them work it out to their best satisfaction, to get the job done the best way we could.

REYNOLDS—Recross

[Tr. 406-407]

BY MR. KINCAID:

Q I show you, Mr. Reynolds, what has been marked as Defendant's Exhibit 6 for identification and ask you if this is the order of which you speak? (handing document to witness) A Yes, this is the order that was published.

Q What is the date shown thereon? A Twenty-fifth of March 1962, effective date shown.

Q Does this represent a change from what was done before? Or do you say Plaintiffs' Exhibit 6 authorizing 30-minute lunch periods wasn't the same? A Yes, this represents a change.

Q Would you specify in what way this is a change? A Well, you have here this—you weren't allowed to leave the post prior to this, the installation you were assigned to, wasn't allowed to leave it. The old orders, they weren't allowed to remove any parts of their uniform. And, well, they would be the main changes I would say.

WARD—Direct

WITNESS FOR RESPONDENT

[Tr. 417-418] Q In what capacity are you employed? A Chief of the Security Police Branch.

[Tr. 423-424] Q Now, in March of 1962, an addition to the SOP's was issued relative to free lunch time? A It was not an addition to the SOP. I believe it was put out either in disposition form or by memorandum, or by letter.

Q Did that in your view change existing practice? A Yes, because it gave them free time.

Q But did it change existing practice to the extent that the men were for the first time to be given 30 minutes for lunch? A To be given 30 minutes' free time for lunch.

Q But did the men have 30 minutes for lunch prior to the time? A Not always, no sir.

Q What do you mean "not always?" A Not always. Quite a number of times the shift officers didn't get lunch themselves.

[Tr. 424] Q Was that brought to your attention? A Yes, it was.

Q Did you bring it to the attention of the Provost Marshal? A Not to the best of my knowledge, no.

Q Why didn't you bring it to the attention of the Provost Marshal? A Well, this has been going on for quite sometime and they did a lot of griping about it, but that's all the further it went. The Chief also knew it was going on. It has been going on—if I may say this, Your Honor—since I have been on the guard force, which was back in 1948.

[Tr. 425] Q Now from 1955 to 1962, you say that although regulations stated a man was to have a 30-minute lunch period, on occasion he did not get it? A That is correct.

[Tr. 428] Q So you state that even though Colonel von Benge told you to take a half-hour lunch period, it was humanly impossible for you to do so? A That is correct. I am not griping about it.

[Tr. 434] Q I ask, Chief, do you have certain posts that you designate as relief posts, men who are to perform only the function of relieving— A I never have been that fortunate enough on all shifts to do that.

Q Do you have posts set up that way? A We would like to have but we just don't have the manpower for it.

Q In your SOP's, don't you have provisions for relief posts? A This is correct, we do. But we just can't man them, sir.

STIPULATION

BETWEEN PETITIONER AND RESPONDENT

[Tr. 369 and 370]

MR. DAWSON: All right. It is stipulated by and between counsel for the respective parties that if the remaining plaintiff's other than the widows of the former deceased guards, were called as witnesses in this case, that their testimony would be only cumulative to the testimony already entered in the record here as to the work performance and as to the "A", "B", and "C" shifts of the guards and other testimony relative to the work performed by the plaintiffs in the Frankford Arsenal which is the subject matter of this litigation. Do you so stipulate, Mr. Kincaid?

MR. KINCAID: I so stipulate.

In the United States Court of Claims

No. 481–61

(Decided March 13, 1964)

WALTER E. BANTOM, JR., ET AL. v. THE UNITED STATES

Claude L. Dawson for plaintiffs.

Thomas J. Lydon, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

PER CURIAM: This case was referred pursuant to Rule 45 to Herbert N. Maletz, a trial commissioner of this court, with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in a report filed May 21, 1963. Plaintiffs filed exceptions to the commissioner's report and a brief. Defendant filed a notice of election to submit on the commissioner's report without a brief. The case was submitted to the court on oral argument of counsel. Since the court is in agreement with the findings and recommendation of the trial commissioner, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in the case. Plaintiffs are not entitled to recover and their petition is dismissed.

OPINION OF COMMISSIONER

Plaintiffs, civilian security policemen employed by the Department of the Army at the Frankford Arsenal, Phila-

delphia, Pennsylvania, bring suit to recover overtime compensation under the Federal Employees Pay Act of 1945, as amended (5 U.S.C. 911).[1] They claim first that they were required to report for work 30 minutes prior to the start of their tour of duty without being paid therefor, and second that they did not have available a 30-minute lunch period as required by regulation, but instead were on duty during that time. Each plaintiff thus seeks overtime pay for 1 hour per day or a total of 5 hours during each workweek of his employment that falls within the six years preceding the filing of the petition on December 29, 1961. Defendant says that plaintiffs worked a total of 8 hours per day for which they have been fully compensated.

The civilian security police force at the Frankford Arsenal was charged with the physical security of the installation and of certain outlying areas. The force was under the supervision of a Provost Marshal and his immediate subordinate, the Security Officer, while its day-to-day operations were directed by a Chief of Police and subordinate shift captains and lieutenants. The policemen operated motor vehicle patrols, manned various posts and gates at the Arsenal proper which covers an area of about 128 acres, and guarded an outpost located some 4 miles away.

Members of the force were employed on the basis of an 8-hour working day, five days per week, but at various times were required to work six days a week for which they received overtime compensation. The force operated around-the-clock on the basis of 3 shifts known as the "A", "B" and "C" shifts. For the greater part of the claim period, the tour of duty on the A shift was from 7:30 a.m. to 4:00 p.m.; on the B shift from 3:30 p.m. to 12 midnight; and on the C shift from 11:30 p.m. to 8:00 a.m. Each shift overlapped the other by 30 minutes and while the shifts themselves were of 8½ hours' duration, ½ hour was set aside by regulation for lunch purposes. This overlapping of shifts gave continuity to the

[1] This statute provides in part:

"All hours of work officially ordered or approved in excess of forty hours in any administrative workweek performed by officers and employees to whom this subchapter applies shall be considered to be overtime work and compensation for such overtime work, except as otherwise provided for in this chapter, shall be at * * * an amount equal to one and one-half times the hourly rate of basic compensation of such officer or employee * * *."

entire operation and permitted the policemen to perform certain pre-shift activities during their tour of duty.

Members of the force were required to punch a time clock in police headquarters at the beginning of their tour of duty; i.e., at 7:30 a.m. on the A shift, at 3:30 p.m. on the B shift, and at 11:30 p.m. on the C shift. Immediately thereafter a roll call and inspection were held in the headquarters at which each policeman was required to be in full uniform and to be neat in appearance. In order that he be ready to assume his responsibility immediately, he was also required, pursuant to verbal orders of the shift captains, which were tacitly approved by the Chief of Police, to be armed with his pistol or revolver, together with ammunition therefor. In the event a policeman stood roll call without his side-arm, he was admonished but not marked late. The time required for an entire shift of 20 men to stand in line, turn in their gun chits and draw their weapons and ammunition was not in excess of 5 minutes, with each man needing not more than 15 seconds for this purpose.

Policemen owned their own uniforms which they were permitted to wear to and from work. However, most preferred to keep their uniforms in lockers located adjacent to the roll call area, and to change into and out of them on arrival and departure. The men arrived at headquarters at varying times before their tour of duty started, with some coming in just prior to roll call while others arrived anywhere up to 30 minutes before the start of roll call.

The majority of posts at the Arsenal were rotated among policemen on a daily basis and at roll call, which averaged about 5 minutes, the specific assignments for each policeman on that shift were called out by the shift supervisor. In addition, a roster of assignments, prepared the previous evening, was available for examination beforehand.

Upon completion of roll call, the policemen dispersed to their posts. Those who had assignments in the vicinity of headquarters proceeded to their posts by foot and relieved the policemen on the outgoing shift who returned to headquarters. Those assigned to more distant posts (of which there were three) were transported there by motor vehicle, which in turn brought the outgoing policemen back to headquarters. These vehicles were driven by policemen assigned

to the motor vehicle patrol for that shift. Policemen on that assignment were excused from roll call, and subsequent to the start of their duty shift made a cursory check of their vehicles to see that they were operational.

In practice, the ½ hour for pre-shift activities (e.g. between 7:30 a.m. and 8:00 a.m. on the A shift) was more than sufficient to enable the incoming policemen to punch in, obtain their assignments, perform pre-duty post chores and relieve the policemen on the preceding shift in time for them to check out from headquarters on the hour. Indeed, members of the outgoing shift frequently returned to police headquarters before the end of their tour of duty, in which event they were on occasion given a specific assignment before checking out. Sometimes they utilised the time in brushing up on their training. However, it was not uncommon for the outgoing policemen to have leisure time in the interval before completion of their tour of duty.

Arsenal regulations provided that the policemen were to have a 30-minute lunch period during each work shift. The regulations prohibited them from leaving the Arsenal for lunch, and this restriction was in effect during most or all of the claim period. The policemen were free to have lunch anywhere within the Arsenal, where various eating facilities were available on the A and B shifts but not on the C shift, thus making it necessary for men assigned to that shift to bring their lunch. As a matter of personal choice, a majority of the policemen on the other shifts also brought their lunch. The luncheon meal could be eaten at police headquarters or at other areas within the Arsenal, as the individual saw fit. However, because of the vicissitudes of police work, no specified time for lunch was ordinarily prescribed so that a given policeman's lunch period might vary from day to day.

Certain posts on the Arsenal required the constant presence of a policeman and, therefore, a man assigned thereto could not leave his post for lunch or other purposes until he was relieved by another member of the force. Accordingly, the regulations made provision for relief posts in addition to the specified posts, and generally at roll call certain policemen were designated as relief men. If the force was shorthanded on a given day or if the relief men were occupied with other duties, the supervisory elements of the force acted as relief

men. Generally during the claim period, relief was available to the policemen so that they could have the 30-minute lunch period. But on unspecified and irregular occasions, due to a shortage of personnel, relief of a policeman was not always possible with the result that he was deprived of his lunch period away from his post. This was not known to the Provost Marshal or the Security Officer, nor did any policeman complain to them about the situation. In the absence of complaint, and having seen various members of the force eating their lunch at the Arsenal's cafeterias and snack bar, these two officials had reason to believe that the regulation prescribing a 30-minute lunch period was being fully complied with.

Not all posts on the Arsenal required assignment of relief men: some were manned by 2 or 3 policemen, thus enabling the men to relieve one another from duty for lunch and other purposes. In addition, a policeman assigned to a motor patrol was allowed to take his vehicle out of service and have his lunch period. Similarly a man assigned to a "clock patrol" could stop his clock and suspend his patrol for a 30-minute lunch period.

Pursuant to regulation, it was necessary for a policeman to call into headquarters and tell his shift supervisor that he was taking his lunch period and give him the telephone number where he could be reached. He was also required to call in when his lunch period was over. During his lunch period, the policeman was subject to a call back to duty in the event the Arsenal fire alarm sounded, or some other emergency situation arose. The evidence does not show that substantial work was actually performed in that time.

Against this background, the first question is whether plaintiffs were required to report for work 30 minutes prior to the start of their tour of duty. The record shows that no such reporting time was ever officially ordered or approved, orally or in writing, so as to permit recovery for overtime compensation under the Pay Act. See *Gaines* v. *United States*, 132 Ct. Cl. 408 (1955); *Tabbutt* v. *United States*, 121 Ct. Cl. 495 (1952); *Post* v. *United States*, 121 Ct. Cl. 94 (1951). Nor were the policemen "induced or directed by (their) superiors directly or indirectly by writing or otherwise" to work this overtime period. *Gray* v. *United States*,

136 Ct. Cl. 312, 313 (1956); *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956). It is quite true that some plaintiffs arrived at police headquarters at various intervals up to 30 minutes prior to commencement of their duty shift. However, this early arrival was not occasioned by any requirement or order, but rather was voluntary on the individual policeman's part because of his own personal preference to change into and out of uniform at the locker room in police headquarters instead of wearing it to and from work as he was authorized to do. The fact that some plaintiffs voluntarily came to work earlier than required cannot support a claim for overtime compensation. *Baca* v. *United States*, 150 Ct. Cl. 70, 86 (1960); *Goode* v. *United States*, 25 Ct. Cl. 261, 267 (1890).

There remains the further consideration that verbal orders of the shift captains, which were tacitly approved by the Chief of Police, required the men to be armed at roll call with their guns and ammunition so that they would then be ready to assume their full responsibility. Assuming that such tacit approval constituted official approval within the meaning of the Federal Employees Pay Act (see *Albright* v. *United States*, Ct. Cl. No. 263–61, decided April 5, 1963, slip op. p. 4), at most the total time needed for an entire shift to draw weapons and ammunition from the gun room prior to roll call was 5 minutes, while the time needed for any one man to perform this activity did not exceed 15 seconds. In the circumstances of the present case, this is negligible and must be disregarded as *de minimis*. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1942); *Ahearn* v. *United States*, 142 Ct. Cl. 309, 312 (1958). Furthermore, the time required to draw weapons and ammunition was more than offset by relief periods allowed policemen during which they could leave their posts for various reasons. Also serving as an offset were the various occasions when policemen enjoyed leisure time in the interval between completion of their duty shift and the time for checking out.

As to plaintiffs' contention that they did not have available a 30-minute lunch period, the evidence establishes that each plaintiff was entitled by regulation to a 30-minute lunch period per duty shift; that responsible officials of the Arsenal

had sound reason to believe that this regulation was being fully complied with; and that they made every reasonable effort to insure that such a period was available. The evidence also establishes that the regulation was for the most part complied with and that a 30-minute lunch period away from their posts was generally available, which the plaintiffs were permitted to utilize, as they saw fit, within limitations which appear reasonable and proper. The facts are thus quite different from those in *Albright* v. *United States*, *supra*. In that case civilian security guards, employed by the Norfolk Naval Shipyard, sought overtime compensation on the ground that they were required to report for work before their tour of duty began. Defendant conceded this, but sought to offset such extra periods of work with the time taken by the guards for their meals. The court denied the offset since a lunch period was not provided for in the regulations and the evidence showed that it was necessary for the guards to eat "on the job at their assigned posts, that is, while walking a beat, sitting at a stationary post, or while riding in a vehicle on a patrol assignment." *Id.*, pp. 4, 11.

Nor can plaintiffs recover for the unspecified and irregular occasions when they were deprived of a lunch period away from their post because of inability to obtain relief. Apart from absence of proof as to when these instances occurred, it is significant that plaintiffs made no complaint to the responsible officials; indeed, such officials had no knowledge of the situation. In these circumstances, work performed by policemen during these periods cannot be said to have been "officially ordered or approved" so as to be compensable under the Pay Act. *Gaines* v. *United States*, 132 Ct. Cl. 408 (1955); *Tabbutt* v. *United States*, 121 Ct. Cl. 495 (1952); *Post* v. *United States*, 121 Ct. Cl. 94 (1951).

Plaintiffs' principal contention is that since they were on a duty status for 8½ hours per shift (e.g., from 7:30 a.m. to 4:00 p.m.) and were only paid for 8 hours, they were entitled to ½ hour additional compensation, notwithstanding that this time was set apart for lunch. The basis for the contention is that the lunch period was not "free time" since the policemen were subject to call back to duty in case of

emergency. The difficulty with the argument is that an employee is not entitled under the Federal Employees Pay Act to compensation for time set aside for eating, even where the employee is on a duty status and such time is, therefore, subject to possible interruption. Compensation is available only if it is shown that substantial official duties were performed during that period. Thus, in *Armstrong* v. *United States*, 144 Ct. Cl. 659 (1959), *cert. den.* 361 U.S. 825, a group of civilian firefighters employed by the Air Force sought to recover overtime compensation under the Federal Employees Pay Act for time during which they were required to be on the employer's premises and subject to call but during which time they were permitted to eat and sleep. This court held that under the particular facts of the case it appeared that no substantial duties were performed by plaintiffs during sleeping and eating time and consequently the time did not constitute "hours of employment" for overtime purposes within the meaning of the statute. See also *Gaetke* v. *United States*, 136 Ct. Cl. 756, 758 (1956); *Collins* v. *United States*, 141 Ct. Cl. 573, 575 (1958); *Ahearn* v. *United States*, 142 Ct. Cl. 309, 311 (1958); *Bean* v. *United States*, 146 Ct. Cl. 267, 269 (1959); *Ahearn* v. *United States*, Ct. Cl. No. 332–55, decided October 5, 1960, *cert. den.* 364 U.S. 932. On the other hand, in *Farley* v. *United States*, 131 Ct. Cl. 776 (1955), and *England* v. *United States*, 133 Ct. Cl. 768 (1956), plaintiffs who were correctional officers at a Federal reformatory and required to remain there several nights a week were held entitled to overtime compensation for the time authorized for sleeping and eating because substantial labor was performed during that time.

In the present case, while the plaintiffs were subject to call during their lunch period in the event of fire or other emergency, the record fails to demonstrate that they performed substantial official duties during that period and hence recovery for overtime compensation may not be permitted. Furthermore, the fact that the policemen were required to eat at the Arsenal is of no consequence; the Federal Employees Pay Act is not "meant to compensate an employee merely because he was required to * * * eat on the employer's premises instead of at home." *Armstrong* v. *United States*, *supra* (144 Ct. Cl. at 664).

In view of the foregoing, it is unnecessary to consider defendant's argument that the claims are barred by the doctrine of laches or its plea of estoppel.

FINDINGS OF FACT

1. (a) All 96 plaintiffs in this case are citizens of the United States. 91 of the plaintiffs were employed at various periods of time during the six years prior to the filing of this petition on December 29, 1961, as civilian security policemen or guards at the Frankford Arsenal, Philadelphia, Pennsylvania. The remaining five plaintiffs are widows or the sole surviving heir of persons who served as security policemen or guards at this installation during the above period.

(b) Of the 96 policemen involved in this action, 27 had been employed at the Arsenal since 1948; a total of 75 had been so employed since 1951; and a total of 92 had been so employed since 1953. Two were employed in 1955, one in 1960, and one in 1961.

2. The Frankford Arsenal proper covers an area of approximately 128 acres and includes about 234 buildings.

3. (a) The civilian security police force at the Frankford Arsenal was a branch of the Intelligence, Security and Safety Office and was charged with the security of the Arsenal and its outlying installations. The police force was under the over-all supervision of the Provost Marshal, a commissioned officer of the U.S. Army, and under the direct supervision of the Security Officer (later called the Security Administrator) who was a subordinate of the Provost Marshal. The Chief of the security police was in charge of the day-to-day administration, operation and deployment of the policemen.

(b) The police force was composed of a chief, an assistant chief, shift captains (who were initially designated as sergeants) and policemen (who were initially designated as guards). Of the 96 plaintiffs involved in the suit, 2 were chiefs of police, 8 were captains or acting captains, and 18 were lieutenants or acting lieutenants. These ranks comprised the supervisory element of the police force.

4. At all revelant times, the police force at the Arsenal was employed on the basis of an 8-hour working day, five days per week. However, at various periods the force was re-

quired to work six days a week for which it received overtime compensation.

5. (a) The police force operated around-the-clock on the basis of 3 shifts known as the "A", "B" and "C" shifts. Beginning in June 1956, the tour of duty for each of these shifts was as follows:

A shift—7:30 a.m. to 4:00 p.m.
B shift—3:30 p.m. to 12 midnight
C shift—11:30 p.m. to 8:00 a.m.

(b) Prior to June 1956, the tour of duty for each of these shifts commenced and ended 30 minutes earlier than the times listed above.

(c) Prior to 1958, these shifts were generally manned on a two-week or monthly rotation basis. Thus, a policeman would be assigned to the A shift for two weeks or a month, following which he would be assigned for the next two weeks or month to the C shift, then to the B shift, after which he would revert to the A shift and so on. In 1958 rotation of shifts was discontinued and policemen were generally assigned permanently to one of the 3 shifts.

(d) From April 30, 1948, until December 31, 1950, policemen at the Frankford Arsenal were employed on the basis of a straight 8-hour day. The shifts operated as follows:

A shift—8:00 a.m. to 4:00 p.m.
B shift—4:00 p.m. to 12 midnight
C shift—12 midnight to 8:00 a.m.

6. The operation of each shift was under the immediate charge of a shift captain who reported directly to the chief of police. The shift captain was responsible for the assignment of policemen to various posts; for insuring that policemen complied with the duties as specified in the regulations and directives; and for seeing to it that the policemen on his shift obtained relief from their posts so that they could have a 30-minute lunch period.

7. (a) The police force operated under regulations known as Standard Operating Procedures (S.O.P.). These regulations prescribed general orders and instructions concerning the duties of the policemen and the specific duties applicable to designated posts.

(b) S.O.P. 513 (Revised June 1956) read as follows:

LUNCH PERIODS AND RELIEF

1. Duty hours for the Security Branch for each shift is as follows:

a. *"A" Shift—0730–1600 hours*

All personnel of this shift will report for duty and ring in their time cards no later than 0730 hours, at which time they will be issued arms and ammunition, inspected in ranks and given such instructions as necessary by the Security Police Captain. Those men assigned for duty at Gage Laboratory will report directly to their respective places at the time prescribed above and will receive arms, ammunition and orders from the Senior Security Policeman in charge at that particular installation. All Security Policemen will then be posted in sufficient time to relieve the old Security Policemen by 0800 hours.

b. *"B" Shift—1530–2400 hours*

All personnel of this shift will report for duty and ring in their time cards no later than 1530 hours, at which time they will be issued arms and ammunition, inspected in ranks and given such instructions as necessary by the Security Police Captain. Those men assigned for duty at Gage Laboratory will report directly to their respective places at the time prescribed above and will receive arms, ammunition and orders from the Senior Security Policeman in charge at that particular installation. All Security Policemen will then be posted in sufficient time to relieve the old Security Policemen by 1600 hours.

c. *"C" Shift—2330–0800 hours*

All personnel of this shift will report for duty and ring in their time cards no later than 2330 hours, at which time they will be issued arms and ammunition, inspected in ranks and given such instructions as necessary by the Security Police Captain. Those men assigned for duty at Gage Laboratory will report directly to their respective places at the time prescribed above and will receive arms, ammunition and orders from their Senior Security Policeman in charge at that particular installation. All Security Policemen will then be posted in sufficient time to relieve the old Security Policemen by 2400 hours.

2. The attention of all Security Policemen is directed to General Security Police Order #4, which provides that a Security Policeman will quit his post only when

properly relieved. This means specifically that when a Security Policeman is officially posted, he is charged with the duties as prescribed in the General and Special Orders, and such other instructions as he may receive from his Security Police Captain until he is officially relieved.

3. It is recognized that at certain periods a Security Policeman requires relief for various reasons. The Security Police Captain, therefore will see that each Policeman receives relief.

4. Lunch Period: The Security Police Captain will authorize absence from duty for a period not to exceed thirty (30) minutes. The Security Policemen on their lunch period will not be permitted to leave the installation where they are posted and they must be at such a place where they can be reached by telephone and the nearest telephone number will be given to the Security Police Captain prior to taking the lunch period. When messing facilities are not available Security Policemen will be required to bring their lunch.

(c) S.O.P. 513 superseded a similar regulation which had been in effect from December 31, 1950. Under the earlier regulation the hours of duty for each shift started and ended 30 minutes earlier. The earlier regulation also contained reference to three outposts, Tacony Depot, Burlington Warehouse and Gage Laboratory, and specified that "the senior guard in charge of each installation is authorized to grant the prescribed reliefs and lunch periods and he is charged with maintaining an accurate record of such reliefs and lunch periods and will forward this report to the Shift Leader at the completion of his shift." The Arsenal police force's responsibility for the Tacony and Burlington outposts ceased some time prior to April 1956 and S.O.P. 513 contained no reference to them.

(d) S.O.P. 511 (Revised January 1956) entitled "Security Police Regulations" provided in part as follows:

> The following restrictions and regulations are issued to the Security Policemen for strict compliance:
>
> * * * * *
>
> 14. It is ordered that all Security Policemen be thoroughly familiar with all General and Special Orders, and especially know the Special Order of his assigned post.
>
> * * * * *

17. There is no time allowed during the tour of duty for any breaks or intermissions. This is not to be construed as preventing a Security Policeman from eating his lunch or advising the Police Captain that relief is necessary.

8. As indicated above, the policemen were required to report for duty at the beginning of the duty shift (at 7:30 a.m. on the A shift, 3:30 p.m. on the B shift, and at 11:30 p.m. on the C shift) and to punch a time clock in police headquarters at the designated time which signaled the commencement of their duty shifts for work and pay purposes.

9. (a) At or shortly after 7:30 a.m., 3:30 p.m. and 11:30 p.m. (depending on the shift) a roll call and inspection were held in police headquarters. At the roll call each policeman was required to be in full uniform which had to be clean and neatly pressed; to have his equipment clean and shined; and to be neat in appearance. Pursuant to verbal orders of the shift captains, which were tacitly approved by the Chief of Police, he was also required at roll call to have on his pistol or revolver, together with ammunition therefor. In short, at roll call each policeman was expected to be ready to assume his full responsibility. In the event a policeman stood roll call without his side-arm, he was admonished but not marked late.

(b) Generally it was necessary for the policemen to draw their weapons and ammunition from the gun room (located in police headquarters) prior to the beginning of their duty shift. Based on the testimony and based on this Commissioner's view of the operations of the B shift, it is found that the total time needed for about 20 policemen to stand in line, turn in their gun chits and draw their weapons and ammunition was not in excess of 5 minutes, and that the time required for one policeman for this purpose was not in excess of 15 seconds.

(c) On various occasions, weapons and ammunition were issued to the policemen after the time prescribed for commencement of their duty shift.

10. In order that the policemen could withdraw their weapons and ammunition prior to the duty shift, a lieutenant was directed to open the gun room prior to the start of the shift. To compensate him for early reporting, he was al-

lowed to terminate his tour earlier than the prescribed time. Generally, the lieutenant reported for duty 15 minutes prior to the shift (e.g., at 7:15 a.m. on the A shift), opened the gun room at this time, made an inventory of its contents, and then issued the side-arms to the policemen. He was authorized to leave for home 15 minutes early that day.

11. The policemen were required to be in uniform and to wear their weapon during their entire tour of duty. They owned their own uniforms and received an allowance from the Arsenal to cover their cost and replacement. They were permitted to wear their uniforms to and from work. However, a majority of the policemen preferred to wear their civilian clothes to and from work and kept their uniforms in their lockers located adjacent to the roll call area, and changed into and out of them on arrival and departure. Policemen arrived at police headquarters at varying times before their tour of duty started. Some came in just prior to roll call, while others arrived anywhere up to 30 minutes before.

12. (a) At the roll call the assignments for the policemen were called out and special instructions given. The roll call varied from 1 to 10 minutes and averaged about 5 minutes.

(b) The specific assignment of policemen to the various posts was generally prepared on the preceding day and listed on a roster which the policemen could examine prior to roll call. The purpose of calling out the assignments at roll call was to make last-minute changes in case a policeman was sick or an emergency situation developed. In addition, projection schedules were made up for a monthly period and posted on the bulletin board at police headquarters, indicating the assignments and annual leave of the men for the month. This schedule was revised from time to time because of emergency or other conditions.

(c) Most of the posts at the Arsenal were rotated from policeman to policeman on a daily basis. However, several posts were assigned on a permanent basis.

13. (a) After roll call, the policemen dispersed to their posts. Those assigned posts in the vicinity of police headquarters walked to their posts and relieved the outgoing policemen; those assigned to more distant posts were transported there by motor vehicle, which in turn brought police-

men from the outgoing shift back to headquarters. The most distant post on the Arsenal was about one mile from headquarters; and only three posts were beyond walking distance.

(b) A policemen who was assigned to motor vehicle patrol was excused from roll call and subsequent to the start of the duty shift (7:30 a.m., for example) would make a cursory check of the vehicle to make sure it had not been involved in an accident or otherwise damaged during the preceding shift. Following completion of roll call, the policemen assigned to the vehicles were ready to commence operation thereof.

14. In summary, while the policemen's tour of duty began at 7:30 a.m. on the A shift, 3:30 p.m. on the B shift and 11:30 p.m. on the C shift, they did not actually assume their daily duty posts until some time prior to the hour following the commencement of the duty shift. For example, while policemen on the A shift were required to report for work at 7:30 a.m., they would not assume their actual daily duty post until some time prior to 8:00 a.m. The pre-shift activities during which the policemen responded to roll call, received their assignments and any special instructions, and walked or were driven to their posts to relieve policemen on the outgoing shift could be accomplished subsequent to the required reporting time in sufficient time to enable members of the outgoing shift to be relieved and punch out on the hour on which their tour of duty ended. For example, the A shift which reported for work at 7:30 a.m. would relieve the C shift in sufficient time to enable policemen on that shift to punch out at 8:00 a.m. This was also true relative to relieving the other shifts. After having been relieved from their posts, members of the outgoing shift assigned to posts in the Arsenal returned to police headquarters to sign out. Frequently they returned before the end of their tour of duty, in which event they were sometimes given specific assignments to be accomplished before the check-out time. On occasion they utilized the time in brushing up on their training. And on occasion they had leisure time for the interval.

15. (a) The posts to which the policemen were assigned were designated by numerals; e.g., Post No. 1, Post No. 2, etc. These designations ran up to 32, but this does not indicate that there were 32 posts in operation at any one time since during the claim period various posts were discontinued and addi-

tional posts created. There were more posts in 1955 than at the present, and the police force has been reduced during this period. In addition to the posts, the policemen manned 6 gates until 1958 when only 4 gates were so manned.

(b) Certain posts and gates were manned by one policeman; others by two or more policemen.

(c) The number of posts and gates that were manned varied from shift to shift with more in operation on the A shift than on the B or C shifts. In 1956 about 30 policemen worked the A shift, 25 policemen the B shift and 20 the C shift. As of May 1962 about 22 policemen worked the A shift, 17 policemen the B shift and 14 the C shift.

(d) Prior to April 1956 policemen from the Arsenal were assigned to outposts outside the confines of the Arsenal, designated as the Tacony Depot and Burlington Warehouse. After April 1956 policemen were no longer assigned to these two outposts. The only other outpost was the Gage Laboratory which was about 4 miles from the center of the Arsenal. This post was manned by two policemen during the greater part of the claim period. Policemen assigned to this outpost went there directly from their homes and were not subject to any pre-shift duty activities. Upon arriving for work at 7:30 a.m., for example, the policemen relieved the on-duty policemen and called the Arsenal to advise the shift captain of this fact.

16. (a) Certain posts required the constant presence of a policeman, and thus a policeman assigned to such a post could not leave until he was relieved. The S.O.P. therefore made provision for relief posts in addition to duty posts. Policemen assigned to these posts were utilized to relieve other policemen at their posts for lunch or other purposes. Generally at roll call certain policemen were designated as relief men. However, if no one was designated for relief, the shift captain instructed certain policemen to relieve others. In addition, policemen on the posts were permitted to call in and request relief for lunch or other purposes. On occasion designated relief men were engaged in other duties which precluded them from acting as relief in which event the supervisory personnel, including the assistant chief, the captains or lieutenants, frequently acted as relief men to enable policemen to leave their posts for lunch or other purposes.

(b) In general, relief policemen or members of the supervisory group were available to enable each policeman to be relieved from his post and have a 30-minute lunch period. However, there were exceptions: on irregular and unspecified occasions, due to a shortage of personnel or because of emergency conditions, relief of a policeman was not possible to enable him to have the lunch period.

(c) Some posts had 2 or 3 policemen assigned to them which enabled the men to relieve one another from duty for lunch and other purposes.

(d) A policeman assigned to motor patrol generally was allowed to take the vehicle out of service and have his lunch period. Another vehicle would then cover that post.

(e) At police headquarters, there were usually sufficient men assigned to effect relief of each policeman for a lunch period.

(f) During that period of the claim up to late 1958 or early 1959, policemen on certain posts were required to carry clocks on their patrols of various buildings within the Arsenal and at the outposts. On weekdays the clocks were only utilized between the hours of 6:00 p.m. and 6:00 a.m. (which involved only the B and C shifts); on Saturdays and Sundays they were used on all three shifts. There were six such "clock patrols". The clocks were portable devices which contained dial sheets or tapes which recorded impressions or "hits" when placed in contact with clock stations located in the various buildings. The time of each "hit" was recorded on the dials or tapes which were read thereafter by the supervisor to make sure that the policemen were patrolling the various installations on their posts. When a policeman on the clock patrol wanted to take his lunch period, he stopped the clock, called the lieutenant at police headquarters and advised him as to when he was taking and terminating his lunch period. This information was marked down by the lieutenant on a call sheet and was later checked with the clock dial or tape to verify the lunch period absence. While assigned to the clock patrol, a policeman was unable to take an excessive lunch period because his absence was recorded both on the call sheet and on the dial or tape.

17. While the policemen were entitled to and generally had available a 30-minute lunch period, because of the vicissitudes

of police work, no specified time for lunch was ordinarily prescribed and, therefore, the lunch period of an individual policeman might vary from day to day. For example, on one day a policeman on the A shift might have available to him the period from 12:30 p.m. to 1:00 p.m. for lunch; on the next day the period from 11:30 a.m. to 12 noon.

18. Generally it was necessary for the policeman to call into headquarters and advise the shift supervisor that he was taking his lunch period and where he could be reached, and to call in when the lunch period was over.

19. During his lunch period, the policeman was subject to call back to duty in the event the Arsenal fire alarm sounded, or an emergency situation arose. The evidence does not show that plaintiffs performed substantial work during their lunch period. Nor is there any evidence in the record showing the number of hours of actual work performed by policemen during this period.

20. S.O.P. 513, which continued in effect until March 1962, prohibited a policeman from leaving the Arsenal during his lunch period. This prohibition was adhered to at least until August 1960 when a new administrative policy was apparently adopted whereby a policeman could leave the Arsenal to eat lunch provided he obtained permission from his supervisor.

21. (a) During their lunch period the policemen were free to go anywhere within the Arsenal to eat their lunch. Various facilities were available on the Arsenal for eating purposes. On the A shift two cafeterias were in operation five days a week, Monday through Friday, one of which accommodated 800 persons, the other 100 persons. Also available was a snack bar that was open 6 days a week but closed on Sunday, where hot meals could be obtained. This snack bar, which had about 9 tables where personnel could sit down and eat, was open during the day and until 12:30 a.m. except Saturday when it closed at 9:00 p.m. However, the grill at the snack bar generally closed at 10:00 p.m. during weekdays so that from then until 12:30 a.m. only cold sandwiches and beverages were available. Several canteens were also in operation throughout the Arsenal which served soup, sandwiches and beverages.

(b) There were no eating facilities available on the Arsenal during the C shift.

22. (a) About 85–90 per cent of the policemen on the A shift brought their lunch with them because of their own personal preference and ate at police headquarters or at other areas within the Arsenal, as they saw fit. Some policemen on that shift purchased and ate their lunch at the cafeterias or snack bar.

(b) Because of the absence of eating facilities on the C shift, policemen assigned to that shift had to bring their lunch which they could eat a various areas within the Arsenal, as they saw fit.

23. In the event a policeman was unable, because of work commitments, to have a lunch period, he was entitled to overtime compensation or compensatory time off.

24. (a) At no time did the Provost Marshal or his immediate subordinate, the Security Officer, ever receive any complaint from any member of the police force that policemen did not always have available a 30-minute lunch period.

(b) From time to time the Provost Marshal and the Security Officer observed policemen eating lunch in the cafeterias, the snack bar and elsewhere. They had no reason to believe, nor did they know, that the regulation allowing a 30-minute lunch period was not always complied with.

(c) On occasion men complained to the Chief of Police, who is a plaintiff here, that they were not always getting the 30-minute period. However, the Chief did nothing about it and did not bring it to the attention of the Provost Marshal. The Assistant Chief of Police, also a plaintiff here, never heard of a man not getting relieved for lunch and never received any complaint about the length of the lunch period, but had heard complaints about the time a man was relieved. On numerous occasions he saw men under his supervision on the A shift eating lunch in the cafeterias.

(d) Members of the police force had the right to take up with an assigned representative in the personnel office any grievance relating to their employment. Plaintiffs knew who their representative was and were familiar with their right to seek relief by way of recourse to such representative. On occasion some of the plaintiffs utilized the grievance procedure to seek redress in respect to various matters concern-

ing their employment. However, at no time did they use this procedure and complain to the grievance representative that they were required to report to work prior to the commencement of their duty shift, or that they were not receiving the 30-minute lunch period specified by the police regulations.

25. (a) Beginning in January 1961, 93 of the plaintiffs filed claims with the General Accounting Office by letters which were virtually the same. A typical letter read as follows:

> I am presently employed at the Frankford Arsenal, Philadelphia 37, Pennsylvania, as a Security Policeman (formerly known as guard) and am required to be on duty eight and one-half (8½) hours each day, for which I receive pay for only eight (8) hours.
>
> I would like to file a claim for back pay, based on a recent decision by the United States Court of Claims, which ruled that, "Federal employees who are required to donate free time to their agency must be paid for the extra time at the overtime rate of compensation for their grade."

(b) In addition, plaintiff Dubin sent the following letter to the GAO:

> I am presently employed in the Frankford Arsenal, Philadelphia, in the Physical Security Branch since 1940. In 1950, there was a change. Our Chief told us that we would have to come in a half-hour earlier, so that we would be in uniform to stand a roll-call inspection prior to being assigned to our various posts, in order to relieve the men of the previous shift in time for them to turn in the revolvers, change their uniforms to street clothing and ring out their time cards on the hour. I was advised by the Civil Service Reporter [publication] to write to this office, in order to file a claim for back pay, because I am forced to give a half hour everyday without being compensated. Last month [December] I was in the Frankford Arsenal Comptroller's office and spoke to Mr. Redlinger, about the claim for back pay voucher form, and was instructed to write to the Comptroller General's office, as there were no forms for claims for back pay in his office.

(c) Plaintiffs' claims were disallowed by the GAO.

(d) While plaintiffs in their letters to the GAO only claimed ½-hour overtime for each duty shift, they seek here to recover 1-hour overtime for each duty shift.

26. It was not until after these claims were filed with the GAO that the Provost Marshal was aware of the plaintiffs' contentions about not receiving a 30-minute lunch period per duty shift. Upon being made aware of these contentions, the Provost Marshal discussed the matter with the Chief of Police who gave him assurance that the policemen had been getting their 30-minute lunch period. The Provost Marshal then issued instructions to the Chief that no policeman, under any circumstances, was to be denied his lunch period and that if anyone were deprived of his lunch because of work commitments, he was to receive overtime or compensatory time off. He also caused to be issued in February 1962 a clarifying directive (effective the following month) to make it crystal clear that policemen were to have a 30-minute free lunch period. The Provost Marshal further required the Chief of Police to certify to him that the policemen were getting their lunch period. The Chief of Police thereafter obtained statements from his shift captains that each man had available at least 30 minutes for lunch or other purposes and upon receipt of this information advised the Provost Marshal in writing that his directive was being carried out.

27. Pursuant to Rule 38(c), the parties entered into a stipulation, approved by the Commissioner, limiting the issues of law and fact relating to the right, if any, of the plaintiffs to recover, reserving the determination of the amount of recovery, if any, for further proceedings.

CONCLUSION OF LAW

On the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and their petition is dismissed.

U.S. GOVERNMENT PRINTING OFFICE: 1984

IN THE

United States Court of Claims

No. 481-61

WALTER E. BANTOM, ET AL.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

PETITION FOR REHEARING

(Filed MAR 30 1964

The plaintiffs file this petition for rehearing within 30 days from the date of the decision on March 13, 1964 primarily upon the ground that the Opinion of the Commissioner, which has now been approved by the Court, conflicts with the Opinion of this Court in the cases of Mack N. Albright v. U. S., No. 263-61 and R. B. Baker, et al. v. U. S., No. 323-61. The Commissioner's Opinion attempts to distinguish the facts in the Albright and Baker cases from the facts in the Bantom case. The plaintiffs in all three of these cases were Security Policemen performing identically the same duties. The plaintiffs in the Albright and Baker cases were employed by the Department of the Navy at the Norfolk Naval Ship-

yard, while the plaintiffs in the Bantom case are employed as Security Policemen by the Department of the Army at Frankford Arsenal located near Philadelphia, Pennsylvania.

An examination of the facts and the Opinions of the Court in these two cases (Albright and Baker being consolidated), the conclusion must be reached that this Court on the same statement of facts has determined that Security Policemen employed by the Navy are entitled to recover while those Security Policemen employed by the Department of the Army are not entitled to recover. Of course, this Court has the right to overrule its Opinion in the Albright and Baker cases, but the Opinion in the Bantom case does not do this. It is thought that by innuendo, at least, that Commissioner Herbert N. Maletz hoped to have the Court adopt an Opinion that would overrule the Albright and Baker cases although, he weakly attempts to differentiate between the Albright and Baker and the Bantom case stating no specific reasons why there is any difference between the work performed by the Security Policemen embraced in the Albright and Baker cases and the same work as performed by the Security Policemen in the Bantom case. Some of the facts allegedly found by the Commissioner are based on fiction rather than evidence at the hearing.

RESUME OF THE FINDINGS OF FACT IN THE ALBRIGHT & BAKER CASES.

These plaintiffs were employed as Civilian Guards at the Norfolk Naval Shipyard, Portsmouth, Virginia. They sought to recover overtime compensation for the respective periods of their employment falling within the six years preceding the filing of the petition.

The basis of their claims was that they were required to report for duty at least 20 minutes prior to the com-

mencement of an 8 hour duty in order to perform certain routine duties in connection with being mustered and assigned to their duty posts. The defendants sought to offset such period of extra duty for the time taken for meals. The sole question involved in these cases was whether the government could claim credit for the luncheon period. The regulations of the Navy Department provide that guards may visit canteens on the post for necessary meals, and there were canteens at various stations in the shipyard. Most of the guards brought their food from home in the form of sandwiches, etc., and ate on the job at their assigned posts, that is, while walking a beat, sitting at a stationary post or riding in a vehicle on a patrol assignment. The actual consumption of this type of meal would take about 20 minutes. The guards were also permitted to purchase food "to go" at the canteens on their posts if it did not interfere with performance of their duties, and on infrequent occasions guards requested permission to eat at the cafeteria, and such requests were granted if there was someone available to cover their posts during their absence. (Finding No. 6)

RESUME OF THE FACTS IN THE WALTER E. BANTOM, JR., ET AL. CASE.

The plaintiffs were Security Policemen or Guards at the Frankford Arsenal under the Department of the Army located near Philadelphia, Pennsylvania. They claim that they were required to report 30 minutes prior to the start of their tour of duty. There were three shifts known as the A, B, and C shifts. The A shift was from 7:30 a.m. to 4:00 p.m.; the B shift was from 3:30 p.m. to 12 Midnight; and the C shift was from 11:30 p.m. to 8:00 a.m. This, you will note, was for a period of 8½ hours during which time they were entirely in a duty status.

While there was no written order requiring them to report ½ hour prior to the time they went on duty, the practice and custom growing over a period of years was that they reported from 15 to 30 minutes prior to their muster and roll call. They had to be in uniform, properly shaved, shoes shined and had to have the issuance of their side arms.

The government contended that the 30 additional minutes was for a lunch period during each of the A, B and C shifts. Like the Civilian Guards employed at the Norfolk Naval Shipyard, 90% of the plaintiffs in the Bantom case carried their own lunch. It was eaten while they were in a duty status, and they were permitted to obtain food from the cafeteria or a snack bar which was open during the A and B shifts, but there were no facilities from which you could obtain food during the C shift, or on Saturday or Sunday.

The question involved in the case was whether the government was entitled to charge ½ hour for eating in lunch periods when the lunches were eaten while they were in a duty status and in the same manner as the lunches were eaten by the plaintiffs in the Albright and Baker cases. There is no difference whatever between the lunch periods in these two cases. In May 1962 for the first time the plaintiffs were given free time during the ½ hour lunch period and this is the first time that they were ever taken off a duty status during the ½ hour period.

The resume of the Albright and Baker cases and the resume of the Bantom case shows that there is no substantial difference, as far as the lunch period was concerned. In the Opinion of the Commissioner it was stated that the luncheon meal could be eaten at Police Headquarters or other areas within the Arsenal as individuals saw fit. There were only two of the plaintiffs who were at the Police Headquarters. There was no evidence at all

that the regulation giving them a 30 minute lunch period prior to May 1962 was ever carried out. The Commissioner also found that the Policemen were free to have their lunch anywhere in the Arsenal. In this connection, attention is invited to the regulation setting forth the lunch period on page 11 of the Findings of Fact of the Commissioner which provides in part as follows:

> "The Security Policemen on their lunch period will not be permitted to leave the installation where they are posted and must be in such a place where they may be reached by telephone and the nearest telephone number will be given to the Police Captain prior to taking the lunch period. When messing facilities are not available, Security Policemen are required to bring their lunch."

It is therefore clear that as found by the Commissioner, they could not eat in any cafeteria, the only one available, unless it was near their post, and the fact is that 90% of the men brought their own lunch. The Commissioner also seems to have found that a plaintiff taking his lunch period would go off-duty. The government's own witness testified (Tr. 510) that all of the plaintiffs were on duty in each shift during the time covered by these shifts, that is, for the 8½ hour period.

The plaintiffs insist that the lunch period they had prior to May 1962, when for the first time they were free during the ½ hour period, was identically the same period was accorded to the Civilian Guards doing the same type of work as they in the Albright and Baker cases.

This Court said, in its Opinion in the Albright and Baker case:

> "But defendant says that since the regulations permitted the guards to visit the canteens for meals, eating time is to be deducted even though the guards

were walking post while they were eating. This is manifestly unsound. A noncompensable lunch period is an off-duty period, which these plaintiffs did not have, and could not have as the schedules existed, unless relieved, due to the nature of their employment as security guards and the requirement of management for maintaining constant surveillance."

Particular attention is directed to the above quote defining a noncompensable lunch period as an off-duty period. The only time that these plaintiffs had an off-duty period for lunch was from May 1962 when the specific order was given. Furthermore, attention is directed to the fact that those employees on the C shift, which was rotated, did not carry their lunch because they had already eaten before they went on duty and they worked the 8½ hours straight through.

Unless this Court intended, by its Opinion on March 13, 1964, to overrule what it said in the Albright and Baker cases, these plaintiffs are entitled to recover perhaps not for the full hour as they sued for but they certainly are entitled to recover for the lunch period. They worked 8½ hours and they are entitled to be compensated for it. Plaintiffs may not be able to recover for all they sued, but in the interest of right and justice they are entitled to recover compensation for the time they were employed over and above the 8 hour period on each shift for the reason you cannot reconcile the decision in the Albright and Baker cases with the decision in this case. The lunch periods are identically the same.

CONCLUSION

For the reasons herein stated, this petition for rehearing should be granted and the case put down for further oral argument before this Court.

Respectfully submitted,

CLAUDE L. DAWSON
810-18th St., N. W., S. 307
Washington 6, D. C.
Attorney for the Plaintiffs.

Court's action on Plaintiff's *petition for rehearing*

On May 15, 1964, the court entered an order denying plaintiff's petition for rehearing.

IN THE UNITED STATES COURT OF CLAIMS

No. 481-61

WALTER E. BANTOM, JR., ET AL

v.

THE UNITED STATES

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above cause, of the Commissioner's opinion, findings & conclusion, of the Opinion of the Court, Per Curiam, of the findings of fact and Conclusion of Law, of Plaintiff's petition for rehearing and of the court's action on the petition for rehearing.

(SEAL)

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the United States Court of Claims at Washington City this 22nd day of July, A. D., 1964.

(signed) Frank T. Peartree
Clerk, United States Court of Claims.

E COPY

Office-Supreme Court, U.S.
FILED
SEP 29 1964
JOHN F. DAVIS, CLERK

No. 382

In the Supreme Court of the United States

OCTOBER TERM, 1964

WALTER E. BANTOM, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOHN W. DOUGLAS,
Assistant Attorney General,
SHERMAN L. COHN,
Attorney,
Department of Justice,
Washington, D.C., 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, No. 481–61 (Pet. App. 1), is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1964. A timely motion for rehearing was denied on May 15, 1964. The petition for a writ of certiorari was filed on August 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

745-327—64

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioners were not entitled to recover overtime compensation under the Federal Employees Pay Act, 5 U.S.C. 911, because they had performed no substantial official duties during their lunch hour.

STATUTE INVOLVED

Section 201 of the Federal Employees Pay Act, 59 Stat. 296, as amended, 5 U.S.C. 911, provides in pertinent part:

> PAYMENT OF OVERTIME; RATES
>
> All hours of work officially ordered or approved in excess of forty hours in any administrative work-week performed by officers and employees to whom this subchapter applies shall be considered to be overtime work * * *.

STATEMENT

Petitioners, civilian security policemen employed by the Department of the Army at the Frankford Arsenal (in Philadelphia, Pennsylvania), brought this action in the Court of Claims to recover overtime pay under the Federal Employees Pay Act, 5 U.S.C. 911. They contend that a 30-minute period set aside by the Arsenal regulations was not in fact available to them and that they were entitled, therefore, to

compensation for an 8½-hour work shift instead of merely 8 hours.[1]

Under the Arsenal regulations, there was no fixed time for the lunch period, which might be taken by the men at different times on different days of the week (Pet. App. 17–18, F. 17).[2] Policemen were entitled to a 30-minute lunch period, during which they were free to go anywhere within the Arsenal. Cafeteria facilities were available during two of the three shifts, but most of the men preferred to bring their own lunches (Pet. App. 16–19, F. 21). Certain posts in the Arsenal required the constant presence of a policeman; those assigned to such posts could not leave until the arrival of relief. If, when lunch time arrived, the appointed relief man was otherwise occupied, the policemen on duty was free to call in and request a substitute. On rare occasions, a shortage

[1] In the court below, petitioners also claimed compensation for time spent at the Arsenal in changing into their uniforms prior to the official morning roll call. The Court of Claims properly held that those policemen who elected to change at the Arsenal, rather than to wear their uniforms to work, did so purely as a matter of personal choice, and were therefore not entitled to compensation for coming early. See *Baca* v. *United States*, 150 Ct. Cl. 70, 86. Petitioners apparently do not challenge that ruling in this Court.

[2] "Pet." refers to the Petition, "Pet. App." to the Appendix to the Petition, and "F." to the findings of fact by the Court of Claims.

of personnel or other emergency conditions made it impossible for a policeman to get away for lunch (Pet. App. 16–17, F. 16). A policeman who missed his lunch period as a result of work was entitled to overtime compensation or compensatory leave. At no time, however, did the Provost Marshal or his immediate subordinate, the Security Officer, receive any complaint that the policemen were not getting a full 30-minute lunch period (Pet. App. 19, F. 23, 24). While the policemen were subject to call during their lunch periods in the event of fire or other emergency, there was no evidence that the claimants actually performed any substantial work during those periods (Pet. App. 18, F. 19).

The Commissioner of the Court of Claims found, *inter alia,* that no substantial official duties were performed during the authorized lunch period and hence that no overtime compensation was due. The Court of Claims adopted the Commissioner's findings and recommendations.

ARGUMENT

The decisions of this Court recognize that an employee who is subject to call by his employer during his eating or sleeping hours is not necessarily entitled to compensation for this time under federal compensation laws analogous to the one involved here. *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133: *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 136–137. The test,

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[3] These cases arose under the Fair Labor Standards Act, 29 U.S.C. 201.

rather, is whether, during the period in question, the employee is required to perform duties, either active or inactive, which substantially interfere with the effective use of the time for his own purposes. "Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Armour, supra,* at 133. Since the *Armour* and *Skidmore* decisions, this Court has consistently declined to review lower court decisions dealing with the compensability of such time in varying factual situations. *E.g., General Electric Co.* v. *Porter,* 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866; *Bell* v. *Porter,* 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Bowers* v. *Remington Rand,* 159 F. 2d 114 (C.A. 7), certiorari denied, 330 U.S. 843; *Rokey* v. *Day & Zimmermann,* 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Sawyer* v. *United States,* 138 Ct. Cl. 152, certiorari denied, 355 U.S. 868; *Conn* v. *United States,* 107 Ct. Cl. 422, certiorari denied, 332 U.S. 757; *Armstrong* v. *United States,* 144 Ct. Cl. 659, certiorari denied, 361 U.S. 825; *Ahearn* v. *United States,* 151 Ct. Cl. 21, certiorari denied, 364 U.S. 932.

In the instant case, the Court of Claims weighed the evidence to determine whether the time for which compensation is claimed was "work" time or "free" time. It found, among other things, that each policeman was entitled by the applicable regulation to a 30-minute lunch period per duty shift; that for the

most part this regulation was complied with; that a 30-minute lunch period away from their post was generally available to the petitioners, who were free to utilize the time as they saw fit, within reasonable limitations; that the evidence does not disclose that petitioners performed substantial work during their lunch period; that responsible officials of the Arsenal had sound reason to believe that the regulation was being fully effectuated and made every reasonable effort to insure that the 30-minute period was available; and that any policeman prevented by work commitments from taking a lunch period was allowed appropriate overtime compensation or compensatory time-off (Pet. App. 7, 18, 19). Those findings, we submit, are fully supported by the record and are dispositive of this case.

Without explicitly challenging any of the above findings, petitioners nonetheless assert that they were "in a duty status" during the entire 8½ hour period of each work shift (Pet. 3). This assertion, however, begs the very factual question which is at issue. While petitioners do not define the term "duty status", they appear to have in mind the fact that they were not "permitted to remove their uniforms" or "take off their side arms" and were "subject to call for duty during this period of time" (Pet. 3). As we have noted, however, those factors are merely the beginning, not the end, of the factual inquiry; they do not in themselves transform into "work" time what would otherwise be "free" time. Insofar as petitioners claim to have been "on duty" in any other sense, they merely seek a redetermination of

the facts found against them by the Court of Claims.[4]

The decision below is not in conflict with that of any court of appeals or with any prior decision with the Court of Claims. In *Culkin* v. *Glenn L. Martin Nebraska Co.*, 97 F. Supp. 661 (D. Neb.), affirmed, 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 866, upon which petitioners chiefly rely, the post guards were permitted to go only to the nearest cafeteria or smoking area during their lunch period (whereas petitioners here were free to go anywhere in the Arsenal); they were required, while in the cafeteria, to remain on the look-out for employees without badges; and "in many instances" they were not relieved of their posts and thus could take no lunch period at all. 97 F. Supp. 661, 669. Thus, it could fairly be concluded that the guards seeking compensation in *Culkin*, unlike petitioners here, were merely performing their regular duties during their lunch hour.

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[4] Petitioners attribute to the Court of Claims "a new theory of law," *i.e.*, that "an employer is relieved of responsibility for the payment of statutory wages where the employee does not complain of being short-changed" (Pet. 7). The Court of Claims, however, alluded to the employer's lack of notice only as a basis for concluding that any work that may have been performed by the policemen during their lunch periods was not "officially ordered or approved" (Pet. App. 7). This Court need not consider whether that factor, standing alone, would justify the conclusion that the time was non-compensable. For the court below found, not only that the employer was ignorant of any breach of the regulations, but also that the 30-minute lunch period guaranteed by the regulations was in fact generally available and that there was no evidence that petitioners performed any substantial duties, active or inactive, during those periods.

Albright v. *United States*, Ct. Cl. No. 263-61, decided April 5, 1963, a prior decision of the Court of Claims, is readily distinguishable. As the court below pointed out, in *Albright* there was no regulation setting aside a lunch period, and the evidence showed that it was necessary for the guards to eat "on the job at their assigned posts, that is, while walking a beat, sitting at a stationary post, or while riding in a vehicle on a patrol assignment." (Pet. App. 7).

In sum, this case presents a purely factual issue which the court below, on the basis of substantiated evidence, resolved against the petitioners. There is no conflict and no occasion for review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1964

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WALTER E. BANTOM, JR., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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The Brief for the United States in Opposition serves only to emphasize the importance of the real questions involved and the need for their solution.

Although the respondent attempts to minimize the issues, it cannot be denied that new principles have been established which are in conflict with decisions of this Court, Courts of Appeal and earlier decisions of the Court of Claims; nor can it be denied that unless corrected the

statutory rights of federal employees to have all hours worked counted and paid for will be denied.

1) The Court of Claims establishes for the government, as an employer, the defense of ignorance of its own employment practices. For many years this Court, and other Courts, without exception, have insisted that compliance with statutory wage, hour, child labor safety and other standards of emplyment is the employers respondibility and that ignorance of violation is no defense.

Although the government would deemphasize the importance of this question by a casual footnote reference to it, it can hardly be denied that the rights of hundreds of thousands of federal workers are placed in jeopardy if the decision stands, for under the principle adopted below an agency need only issue a regulation calling for compliance and then proceed to ignore it with impunity. In this area there can be no lawful or equitable basis for distinguishing in the application of statutory labor standards between private and public employees.

2) Nor simply by saying it isn't so, can the government obscure the plain conflict between the decision below and the decisions of the Courts of Appeal such as Culkin v. Martin, 97 F. Supp 661, 197 F2d 981 (C.A. 8) and that Court's earlier decision in Albright v. U.S. Ct. Cl. No. 263-6.

3) The practice of employing workers for 8½ hours and paying them for eight violates the statute. And that violation cannot be swept under the rug by a rationalization of the facts in the face of clear uncontradicted testimony coming from witnesses for the government as well as for the petitioners. These facts are not open to contest on this record.

a) On the C shift and on Saturday and Sunday there were no eating facilities available. Employees went with-

out eating for the 8½ hour period or ate on the job (Pet. app. 11, 13, 16, 18, 19).

b) On the B shift the cafeteria was not open. (Pet. App. 16).

c) Although a regulation theoretically permitted 30 minutes for lunch, it was conditioned on (1) the employee being able to leave his post, (2) a replacement being provided for him, and (3) the employee giving notice of a telephone where he could be reached, and (4) remaining in uniform with side arms attached. (Pet. App. 19, 21).

d) Only infrequently were employees relieved (Pet. App. 14, 15, 22). Instead, they ate at their desks, at their posts, or took hasty snacks. There is no evidence to counter the showing made that regular periods of 30 minutes or more were not made available for eating during which employees were relieved of their duties. (Pet. App. 11, 12, 14, 15, 16, 17, 18, 19).

e) Only after the complaint made in this case did the agency finally in May, 1962 provide the necessary instructions and implementation to make possible a regular lunch period free of duties (Pet. App. 11, 21). (Petitioners do not seek recovery after May, 1962).

4) Finally there is proposed here, in ence, to establish a dangerous and arbitrary rule to the effect that the government may lawfully assume that during an 8½ hour period, employees must have stopped to eat somehow somewhere and that therefore it would be proper to deduct 30 minutes time. This flies squarely in the face of the principles established by the Secretary of Labor, providing that under the Wage Hour laws all hours of work must be counted toward overtime, that rest periods of 20 minutes or less are counted as time worked, and that lunch periods must be at least 30 minutes and the employee be fully relieved of his duties. (Pet. p. 9)

Respondent is mistaken on its reliance on the Armour and Skidmore cases. The question of whether the 8 hours out of 24, spent in regular eating and sleeping, were compensable hours, was not before this Court in the Armour and Skidmore cases. The Court simply held that productive work and on call time spent in recreation during 16 of 24 hours spent on the employers premises constituted working time. However, the principles established there are applicable. The Court, it will be remembered, extended the category of working time to "on call" periods although no physical or mental exertion was involved. It was on the basis of these and other decisions cited that the Secretary of Labor formulated his position relating to "on call" time and "Rest and Meal Periods" set forth in a footnote on p. 9 of the Petition. There is nothing here to justify a departure during normal working periods of the judicially approved concepts relating to meal periods. In fact, the government recognized this when it belatedly, after suit was filed, issued firm and fully implemented instructions providing a regular 30 minute lunch period during which employees are completely relieved of duties.

For these and other reasons cited in the petition, we respectfully submit that certiorari should be granted.

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